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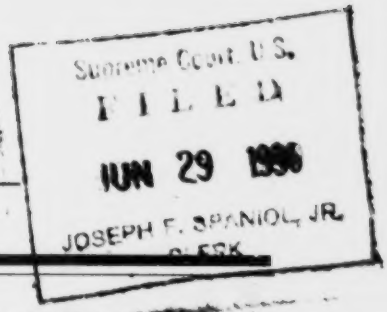

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

PATRICIA C. FOSTER and BRENT FOSTER,

Petitioners,

vs.

MICHAEL STEIN and HAYAT STEIN,

Respondents.

On Petition for Writ of *Certiorari*
To the Supreme Court of the State of Florida

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

1. Can a State court, having no special expertise, exercise subject matter or personal *jurisdiction* over non-resident parties to a paternity/adoption proceeding commenced to execute a surrogate parenting contract, where the uncontested evidence demonstrated that the infant adopted was never within the territorial *jurisdiction* of the forum State and consent to personal *jurisdiction* over the surrogate mother appears to have been obtained by fraud?

2. Does a State court have a 14th Amendment due process obligation to set aside a judgment or grant an evidentiary hearing in a paternity/adoption case commenced to execute a surrogate parenting contract, when the uncontested evidence demonstrated that the court acquired *jurisdiction* by fraud?

3. Where a State court exercises *jurisdiction* over a paternity/adoption proceeding commenced to execute a surrogate parenting contract, can it apply its own State law when the uncontested evidence demonstrated that all the parties resided, and all the events giving rise to the litigation occurred, outside the forum State, and the contract evidenced an intent that domicile law apply?

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Case No. 89-_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

PATRICIA C. FOSTER and BRENT FOSTER,[1]

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vs.

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Respondents.

On Petition for Writ of *Certiorari*
To the Supreme Court of the State of Florida

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of the State of Florida is reported at 557 So.2d 861, and is reprinted in the appendix hereto at page A1.

The opinion of the District Court of Appeal of the State of Florida, Third District is reported at 534 So.2d 1218, and is reprinted in the appendix at page A5.

The memorandum decision of the Circuit Court for the State of Florida (Swanko, Acting Circuit Court Judge) was not reported, but is reprinted in the appendix at page A7.

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[1] Infant A.H. Stein is a real party below, who was never represented.

JURISDICTIONAL STATEMENT

The decision of the Supreme Court of the State of Florida was entered on January 18, 1990. App., p. A1. Petitioner's motion for rehearing was denied April 2, 1990.

Petitioner believes that 28 U.S.C. § 1254(1) and Supreme Court Rule 13.1 probably confer *jurisdiction* on this court because the petition seeks review of a civil action within 90 days of the denial of a motion for rehearing by a court of last resort.

STATUTORY PROVISIONS INVOLVED

U.S. Const., Art. IV, § 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State. And the Congress may be general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

U.S. Const., 14th Amendment, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United State; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Uniform Child Custody Jurisdiction Act[2]
Florida Statutes § 61.1308 Jurisdiction

[2] The UCCJA adopted by each of the respective states differs only in the numbering arrangement of the various subdivisions and paragraphs, but in substance and technical language identical.

Michigan § 600.651

(1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(a) This state:

1. Is the home state of the child at the time of commencement of the proceedings, or

2. Had been the child's home state within 6 months before commencement of the proceedings and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state;

(b) It is in the best interest of the child that a court of this state assume jurisdiction because:

1. The child and his parents, or the child and at least one contestant, have significant connection with this state, and

2. There is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(c) The child is physically present in this state and

1. The child has been abandoned, or

2. It is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected; or

(d) 1. It appears that no other state would have jurisdiction under the prerequisites substantially in

accordance with paragraph (a), paragraph (b), or paragraph (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and

2. It is the best interest of the child that a court of this state assume jurisdiction.

Florida Rules of Civil Procedure, Rule 1.540:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, decree, order or proceeding for the following reasons:

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; ... The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, decree, order or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order or proceeding or to set a side a judgment or decree for fraud upon the court.

Florida Rule of Civil Procedure, Rule 1.140, Defenses

(b) How Presented. ... Any ground not stated shall be deemed to be waived except any ground showing that the court lacks jurisdiction of the subject matter may be made at any time.

Rules Regulating the Florida Bar, DR 5-105. Refusing to Accept or Continue Employment if the Interests of Another

Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(E) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

Florida Statutes § 63.083. Execution of Consent; family medical history.

(1) Consent shall be executed as follows:

(a) If by the person to be adopted, by oral or written statement in the presence of the court or by being acknowledged before a notary public.

(b) If by an agency ...

(c) If by any other person, in the presence of the court or by affidavit.

(d) If by a court, ...

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(4) The consent shall be executed only after the birth of the child, in the presence of two witnesses, and be acknowledged before a notary public.

(5) Consent may be withdrawn only when the court finds that the consent was obtained by fraud or duress.

Michigan Adoption Code § 710.44 Form and Execution of consent

Sec. 44. (1) Except as otherwise provided in this section, the consent required by section 43 of this chapter shall be by a separate instrument executed before the judge of probate having jurisdiction or, at the court's direction, before another judge of probate in this state. A consent may be executed before a referee of the probate court. If the consent of a parent or guardian is executed before a judge or referee as provided in this subsection, a verbatim record of testimony related to execution of the consent shall be made.

(2) [Members of Armed Services and prisoners]

(3) [Wards]

(4) If the consent is executed in another state or country, the court having jurisdiction over the adoption proceeding in this state shall determine whether the consent was executed in accordance with the laws of that state or country and shall not proceed unless it finds that the consent was so executed.

(5) [Exceptions not relevant herein]

(6) [Investigations not relevant herein]

STATEMENT OF THE CASE

On April 15, 1988, Petitioner, Patricia C. Foster (herein the Surrogate Mother[3]), filed a motion to vacate a paternity/adoption judgments in a bifurcated Florida proceeding wherein the first part of the proceeding was to establish paternity under a commercial surrogate parenting contract, and the second half of the proceeding, after birth, was an adoption proceeding. The grounds for vacating the judgment was fraud in obtaining her consent, and fraud in obtaining *jurisdiction* over her and the subject matter in a Florida court.

The facts of case were set forth in a verified motion by Petitioner on her personal knowledge. Respondents Michael Stein (hereinafter, the Surrogate Father[4]) and Hayat Stein (hereinafter, the Adopting Mother), did not answer the verified motion. The Surrogate Father is an attorney. At the trial court hearing, the only evidence which the Steins (hereinafter, the Adopting Couple[5]) presented were a certified Florida judgment of paternity and the certified Michigan judgment of paternity.[6]

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[3] In actuality, Mrs. Foster is the natural mother; the term Surrogate Mother is used for clarity and because the contract and popular nomenclature refers to her as such.

[4] Again, in actuality Mr. Stein is the natural father by artificial insemination; the term Surrogate Father is used for clarity and because he is the other natural parent to the surrogate parenting contract.

[5] While Adopting Couple may be somewhat inaccurate in that the Surrogate Father is not adopting because he is the natural father by artificial insemination, the term is used to refer to both Adopting Couple for simplicity.

[6] The Florida judgment came first and the Michigan judgment came second. If in fact Petitioner consented to a Florida case hearing this matter, why was it necessary for Respondents to go back to Michigan to get another judgment? Petitioner's claim is that when she found out that in reality what

On January 17, 1986, the Surrogate Mother was solicited to, and did, enter into a commercial surrogate parenting contract (hereinafter, Contract) by Michigan Attorney and surrogacy broker Noel P. Keane (hereinafter, Keane), wherein the Surrogate Father would contribute sperm to impregnate her by artificial insemination, which in fact occurred. Thereafter, on March 25, 1987, she gave birth to Infant A. H. Stein (hereinafter, Infant A.).

The boiler-plate commercial contract was executed in Michigan by the Surrogate Mother and her husband on one side, and the Surrogate Father on the other side. At the same time that the Surrogate Mother executed the contract, her husband executed a "Refusal of Consent" document, which recited two (2) Michigan statutes regarding paternity by artificial insemination. The document's last line reads, "I recognize that by refusing to consent to the insemination, I cannot be declared or considered to be the legal father of said child conceived thereby."[7]

At the same time, the Surrogate Mother, her husband, and their Michigan attorney Herbert A. Brail (hereinafter, Brail) signed another document entitled, "Acknowledgement of Independent Counsel." By that document Brail became attorney for the Surrogate Mother in Michigan. Paragraph V(C)(5) provides that the Steins shall pay for the attorney fees incurred by the Surrogate Mother under the contract. In a letter sent to the Surrogate Mother dated eight (8) days after Brail began representing the Surrogate Mother, Brail was

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was supposed to be a Michigan paternity proceeding was in reality a Florida paternity/adoption proceedings, she objected and then the Michigan proceedings were initiated as a ruse to get further signatures which she thought were part of the Michigan proceedings.

[7] The Surrogate Mother and her husband signed releases at the hospital. In the Surrogate Mother's release, she surrendered custody to the Surrogate Father and Adopting Mother, but not any parental rights, and there was an express provision prohibiting adoption, in contrast to her husband's release which expressly provided not only for surrender of custody, but parental rights as well.

listed as an attorney on the letterhead of Keane's law offices, the same Michigan attorney representing the Adopting Couple.

On August 4, 1986 the Surrogate Father filed in Florida Case No. 86-42848 FC (16), an action relating to the paternity and adoption of the Surrogate Mother's then unborn infant. In an August 29, 1986 letter from Keane's law offices, the Surrogate Mother was informed that,

> "Mr. Kessler represents [the Adopting Couple] in the Paternity Hearing[8] and Mr. Jasinski will be representing your interests."

Florida attorney Robert M. Jasinski, in fact filed a Notice of Appearance on behalf of the Surrogate Mother in the Florida paternity/adoption action. Both Kessler and Jasinski were members of the same Florida law firm.[9] On December 19, 1986, a Florida court issued an "Agreed Order Regarding Paternity." Less than a month later, on January 14, 1987 a Michigan court entered a "Consent Order Determining Paternity" in a paternity, but not adoption, action initiated by Brail, purportedly on behalf of the Surrogate Mother. Both the Florida and the Michigan orders declare the Surrogate Father to be the father of the Surrogate Mother's then unborn child. The Michigan decree makes no mention of the Florida decree. Importantly, the Surrogate Father did not declare his residency in the Florida paternity/adoption action he filed, but affirmatively admitted on January 14, 1987 in his an-

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[8] Pointedly, the letter makes no mention of the fact that the proceedings were to be in Florida, and it made no mention of the fact that it was both a paternity and an adoption proceedings.

[9] The Surrogate Mother's motion informed the court that these same attorneys had procured a paternity order in the factually identical Florida case of *Stern v. Whitehead* No. 86-12060 (Fla. 11th Cir. September 1, 1986) wherein Kessler represented the natural father, Stern, and Jasinski represented the natural mother *Whitehead*. The Sterns and the Whiteheads were the litigants in the case of *In the Matter of Baby M*, *supra*.

swer to the Michigan paternity action that he resided in Michigan.

At some point thereafter, Jasinski, the attorney who was representing the Surrogate Mother in the paternity/adoption action, **changed sides in the middle of the Florida case, began representing the Adopting Mother**, and then on April 14, 1987 filed a petition for the adoption of Infant A. on behalf of the Adopting Mother. The adoption petition did not state the residency of either the Adopting Mother or Infant A., but did state that Infant A. was born just 20 days earlier in Detroit, Michigan. Presented with the adoption petition was a putative consent to adopt purportedly signed by the Surrogate Mother in Michigan, and purportedly witnessed by a Michigan notary and two witnesses in Michigan.

The adoption hearing was originally scheduled for June 5, 1987, but was actually heard five (5) days *earlier* on May 29, 1987. The Surrogate Mother received no notice of the adoption hearing, nor did she receive any other notice in this case. The Surrogate Mother was not at the May 29, 1987 adoption hearing but a fourth attorney, Michel Anderson,[10] was present, purportedly representing the Surrogate Mother. Attorney Jasinski, who had represented the Surrogate Mother earlier in the same case, was present representing the Adopting Couple. The final judgment of adoption was entered the same day as the hearing.

Just seven (7) weeks after the adoption hearing, the Surrogate Mother filed on July 22, 1987 the first of three motions to inspect the file in this case. In the motions, the Surrogate Mother contended, *inter alia*, that: the Florida

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[10] According to the *Miami Review*, dated November 13, 1987, attorney Michel Anderson is stated to have started his own a commercial surrogacy business earlier in March, two months before he appeared to represent the Surrogate Mother. The article reports that Anderson represents only the couples and states, "Anderson and Jasinski have each handled about 60 surrogate adoptions including many out-of-state- ...

courts lacked subject matter *jurisdiction* to enter the adoption judgment, as none of the parties were domiciled in Florida; the Surrogate Mother's consent to adopt was obtained by fraud; the Surrogate Mother was fraudulently represented by attorney Brail; the Surrogate Mother had received no notice regarding the May 29, 1987 adoption hearing; and, the laws of Florida were in conflict with the laws of Michigan. All three motions were denied. None were appealed.

On April 15, 1988, ten (10) months after the adoption judgment was granted, the Surrogate Mother timely filed the Verified Motion for Relief From Judgment (hereinafter, VM). The Surrogate Mother therein explicitly alleged, in pertinent part, that:

> "At no time during the pendency of these proceedings was the infant within the territorial *jurisdiction* of this Court. [VM, p. 2.]
>
> "At the time this action was file, the Petitioner [the Surrogate Father] was a Michigan resident and the Respondents [the Surrogate Mother and her husband] were Michigan residents who were never served with process in connection with this proceeding. [VM, p. 2.]
>
> "Although it appears that [the Surrogate Mother's] signature was affixed to the "Consent," the acknowledgment is false as [the Surrogate Mother] never signed any document in the presence of the notary or the two witnesses. [VM, p. 1.]
>
> "Although [Attorney] Jasinski was supposed to represent [the Surrogate Mother's] interests, at some time subsequent thereto he became counsel for the [Surrogate Father], in this action. [VM, p. 4.]
>
> "Based upon the fraud perpetrated by the [Surrogate Father] herein and through counsel ... and the collusion of

counsel, the "Final Judgment of Adoption" and "Agreed Order Regarding Paternity" should be summarily vacated and set aside. [VM, p. 4.]

"Here, the [Surrogate Father] misrepresented to the Court that the [Surrogate Mother and her husband] have appeared voluntarily and that they have consented to the relief he has sought." [VM, p. 8.]

The Adopting Couple did not answer these statements sworn to be true by the Surrogate Mother.

On oral argument on the motion, the Surrogate Mother' counsel argued:

"Essentially, what we are saying is that the orders which were entered by Your Honor -- and I am sure that it was just an innocent thing relying on lawyers appearing before you, who indicated that they had cases that were resolved, ..." RT, p. 4:8-12.

The Adopting Couple's counsel argued to the trial court judge,

"This 87-9 [an administrative order number] gave this Court *jurisdiction*. You properly entered the order for adoption. It cannot be challenged on that ground, *nor as a matter of fact on any other ground*, which I will be happy to argue when the time comes.[11]" RT, p. 6.

In summarily ruling, the trial judge stated,

"Okay. Mr. Elegant [the Surrogate Mother's attorney], I went through your motion, *detailed* motion.

"*****

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[11] All emphasis is added unless otherwise indicated.

"And I must comment and compliment you, that you did an excellent job in preparation. However, I'm going to deny your motion." RT, p. 9:19-24.

The judge's order denying relief dated May 3, 1988 did not give any reason or grounds for the denial, but merely wrote,

"After hearing argument of counsel *and being otherwise fully advised*, it is ADJUDGED that the said *Verified* Respondent's Motion for Relief From Judgment is DENIED." App., p. A7.

The Surrogate Mother appealed to the District Court of Appeal of Florida, Third District (appellate court), on the grounds, pertinent to this petition, that: the court erred in ruling on the case without giving the Surrogate Mother an opportunity to be heard on whether intrinsic and/or extrinsic fraud occurred in the paternity/adoption proceeding; the Surrogate Mother was a Michigan resident who was never served with process in connection with the paternity/adoption proceeding; and, at no time during the pendency of the proceedings was the infant within the territorial *jurisdiction* of the court.

After oral argument the appellate court ruled "the order and judgment were entered without *jurisdiction* over the subject matter..." and at this juncture footnoted:

"We need not consider the effect of the highly disturbing fact that all of the parties herein: the "surrogate" mother; the "natural" father; his wife, the adoptive mother; and the child were and are residents of Michigan who never so much as set foot in Florida. It is apparent therefore that, for unknown reasons, our courts have been employed as an unwelcome means of promoting the interests of persons who have no contact with this state." App., p. A6.

While the appellate court stated that its ruling was grounded on the trial court judge's lack of subject matter *jurisdiction*, the court footnoted:

> "It may be added that the motion was apparently also properly based on allegations of extrinsic fraud relating to the sequential representation by the same counsel of, first, the "surrogate mother" and then the adoptive parents. *See* Fla.R.Civ.P. 1.540(b)(3); *DeClaire v. Yohanan*, 453 So.2d 375 (Fla.1984)." App., p. A6.

After ruling that Petitioner's motion for relief from judgment should have been granted, the appellate court footnoted:

> "This was the ruling of a trial judge in an identical prior situation. *Stern v. Whitehead*, No. 86-12060 (Fla. 11th Cir. September 4, 1986) (order granting respondent's motion for relief from judgment and respondent's supplemental motion for relief from judgment)." App., p. 6.

The appellate court ordered that the trial court vacate its order and judgment. The Adopting Couple' motion for the appellate court to rehear the case was denied.

Thereafter, on April 18, 1989 the Adopting Mother filed an amended adoption petition in this same case wherein she admits that she did not become a Florida resident until August 1988, over a year after the adoption judgment was granted.

The Adopting Couple appealed to the Florida Supreme Court (Supreme court), on the grounds that the Florida appellate courts were in conflict on the issue of the judge's subject matter *jurisdiction*, an issued not appealed herein.

In the Surrogate Mother's brief on the merits before the Supreme court, the Surrogate Mother again argued that: all the parties to the case resided in Michigan; the infant was

never within the territorial *jurisdiction* of the court; and, the judgment had been obtained by both intrinsic and extrinsic fraud. For the first time, the Surrogate Mother argued that the trial court had violated 14th Amendment due process by applying the laws of Florida to Michigan residents, when all the events related to the execution of the Surrogate parenting contract occurred in Michigan. The Surrogate Mother thoroughly argued that the Florida judgment of adoption could not have been obtained in Michigan as the adoption laws of Florida starkly and irreconcilably conflict with the adoption laws of Michigan.

The supreme court granted permission for *Amicus Curiæ*, the Foundation on Economic Trends, parent organization for the National Coalition Against Surrogacy, to file a brief in this case. *Amicus Curiæ* brought to the court's attention and thoroughly briefed the issue of obtaining personal *jurisdiction* by fraud and the State's due process obligation to apply the law of the state which had some relationship to the litigation.

In ruling, the Supreme Court of the State of Florida footnoted, in pertinent part:

> All documents pertaining to this adoption were executed in Michigan, and the child was born in Michigan. The petition for adoption was silent on the residence of the parties, but because of the foregoing it appears that all are Michigan residents. The issue of the *jurisdiction* of the Florida courts to consider the adoption was not raised. § 63.185, Fla.Stat. (1987), enacted subsequent to these proceedings, would clearly proscribe this in the future."[12]

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[12] Evidently the court chose to ignore Fla.Stat. § 61.1308 which provides that a court has *jurisdiction* over custody matter only if the state is the home state of the child, or the child resided within the state within 6 months, or a parent continues to live in the state. It is obvious that an adoption cannot take place unless somebody within the state consents, and therefore the threshold question in adoption proceedings is custody and *jurisdiction* which should have been addressed under existing Florida law.

App., p. A2.

> "The only argument presented at the trial court level was the defect in the assignment of Judge Swanko. We therefore choose to limit this opinion to the *de facto* judge issue and not to address any other points now raised by the parties." App., p. A4.

The Surrogate Mother sought a rehearing, reminding the Supreme court that the Surrogate Mother had in paragraph 5 and 6 of its original verified motion for relief from judgment alleged respectively that, "At the time this action was filed, the [Surrogate Father] was a Michigan resident and the [Surrogate Mother and her husband] were Michigan residents who were never served with process in connection with this proceeding," and that, "At no time during the pendency of these proceedings was the infant within the territorial *jurisdiction* of the court." [Motion for Rehearing, p. 4.]

The Surrogate Mother also reminded the Supreme Court that her motion, from its inception and at all stages of the proceedings, timely alleged intrinsic fraud relating to the consent to adopt document, and extrinsic fraud relating to the attorney who represented the Surrogate Mother and then changed sides in the middle of the case and began representing the opposing side. The Supreme court was informed that its failure to remand the case denied the Surrogate Mother any opportunity to present evidence regarding the fraud, as the trial judge had summarily denied the motion for relief from judgment.

The Surrogate Mother's motion for rehearing was denied without comment by the Florida court on April 2, 1990.

SUMMARY OF ARGUMENTS IN SUPPORT OF GRANTING THE WRIT

1. Whether exercising personal or subject matter

jurisdiction over non-residents which appears to have been obtained by fraudulent consent requires a court to decline to hear the case presents an important federal question not previously decided by this court, and in view of the fact that the state court has departed from well settled jurisdictional principles laid down by this court, there is presented an issue of grave importance for respect and confidence in the integrity of the judicial system that this court should hear and decide the case. The issue was clearly raised below, and while the decision does not conflict with any decision directly on point in this court, still it does depart from general principles laid down by this court where there appears to have been fraud and collusion, such that the court was obliged to either set aside the judgments, or grant an evidentiary hearing.

2. Whether the Florida Court has departed from fundamental principles of 14th amendment due process set down by this court by refusing either to set aside the judgment or grant an evidentiary hearing where the uncontested evidence demonstrates that the judgment was obtained by fraud, presents an important federal question, which deserves this court's attention. Clearly, petitioner raised the issue at every conceivable stage of the proceedings, notwithstanding the Florida Court's opinion to the contrary, and Florida case law clearly requires an evidentiary hearing on allegations of fraud such as raised below. Moreover, this court has long recognized the right to challenge the jurisdiction of the court where fraud is alleged. Under the circumstances, the court's refusal to either vacate the judgment, or grant an evidentiary hearing on the question appears to have denied petitioner due process of law, such that the questions presented need to be reviewed and passed upon by this court.

3. Whether applying Florida law in derogation of Michigan law in the adoption proceedings below usurps the sovereign authority of Michigan to decide the parental status of Michigan Citizens conflicts with long-established principles of this court, and or presents an important federal issue not

previously, but should now be, decided by this court, and in view of the grave consequences which flow from the potential of undermining respect for sister state sovereignty, the case warrants review by this court. The issue was not waived because timely raised under Florida law. Applicable Florida law conflicts in a material way by virtue of the means by which consent for adoption is obtained, that, in the absence of any interest of Florida in the parties and subject matter, Michigan Law should have been applied. It therefore requires review by this court to insure that the sovereignty of Michigan is not usurped or impaired by Florida Courts.

4. This court urgently needs to address each of the foregoing issues raised in the processing of surrogate parenting contracts in forum states other than the domicile of the parties and subject matter to ensure that there is some nexus between the forum and parties in order to protect the sovereignty of sister states in fulfilling their sovereign obligation to provide police protection for their citizens.

REASONS FOR GRANTING THE WRIT

I

WHETHER EXERCISING PERSONAL/SUBJECT MATTER *JURISDICTION* OVER NON-RESIDENTS WHICH APPEARS TO HAVE BEEN OBTAINED BY FRAUDULENT CONSENT REQUIRES A STATE COURT TO DECLINE TO HEAR THE CASE PRESENTS AN IMPORTANT FEDERAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT, AND IN VIEW OF THE FACT THE STATE COURT HAS DEPARTED FROM WELL-SETTLED *JURISDICTIONAL* PRINCIPLES LAID DOWN BY THIS COURT, THERE IS PRESENTED AN ISSUE OF GRAVE IMPORTANCE FOR RESPECT AND CONFIDENCE IN THE INTEGRITY OF THE JUDICIAL SYSTEM THAT THIS COURT SHOULD HEAR AND DECIDE THE CASE.

A. PETITIONER RAISED THE ISSUES OF SUBJECT MATTER *JURISDICTION* AND PERSONAL *JURISDICTION* AT ALL JUDICIAL LEVELS, AND ASSUMING ARGUENDO THAT THE ISSUES WERE NOT RAISED, FLORIDA STATUTORY AND CASE LAW PERMITS THEM TO BE RAISED FOR THE FIRST TIME AT THE SUPREME COURT LEVEL.

The Surrogate Mother argued at all judicial levels that the Florida court lacked subject matter *jurisdiction* and explicitly stated that "the infant was never within the territorial *jurisdiction* of Florida."

The memorandum in support of the verified motion starts out:

> "[The Surrogate Mother and her husband] are clearly entitled to relief from the "Agreed Order Regarding Paternity" and "Final Judgment of Adoption" entered herein because the Court lacked the jurisdiction to enter same and because of the fraud and collusion which permeate said Orders." VM, p. 5.

In support thereof, the memorandum in support of the Verified Motion cites Florida Rule of Civil Procedure, Rule 1.540(b)(3), dealing with fraud. The memorandum continues on a number of grounds, aside from the right of Judge Swanko himself hearing the case, going through each element wherein *jurisdiction* is alleged to be lacking, dwelling at length on fraud. VM, p. 5. And Judge Swanko stated for the record that he had fully read the detailed memorandum. RT, p. 3:9, 9:19-24. Counsel for Petitioner pointed out, with as much tact as possible, that he did not impute the fraud to the judge. RT, p. 4:8-12.

The appellate court raised the issue of subject matter

jurisdiction over the infant by deciding that the issue of whether Florida courts had subject matter *jurisdiction* over non-resident parties who had no contact with the state of Florida was *moot*, given that the appellate court had ruled that the judge lacked subject matter *jurisdiction*. Undeniably, the issue was made clear in the Florida Supreme Court. Petitioner's Petition for Rehearing, p. 2.

Florida Rules of Civil Procedure, Rule 1.140(b) expressly provides, "Any ground not stated shall be deemed to be waived except any ground showing that the court lacks *jurisdiction* of the subject matter may be made at any time." Thus, the supreme court had no independent or adequate state grounds for choosing not to address the issue of subject matter *jurisdiction* over the infant.

The Surrogate Mother informed the court at all judicial levels that the Surrogate Mother had never been served with notice of process and that the Adopting Couple and their counsel had fraudulently represented to the court that the Surrogate Mother had appeared voluntarily and consented to the relief sought. The Surrogate Mother's basic and fundamental argument throughout the entire proceedings revolved around her argument that the attorneys hired by the Adopting Couple to represent her, actually connived with the Adopting Couple's counsel to defeat her rights and appeared on her behalf for that purpose. The fraudulent appearance by the Adopting Couple's attorney on behalf of the Surrogate Mother was the only basis for the courts personal *jurisdiction*.

Even if the Surrogate Mother is found not to have raised the issue of personal *jurisdiction*, lack of personal *jurisdiction* is a constitutional due process error which can be raised for the first time on appeal under Florida law. *D'Oleo-Valdez v. State*, *supra*. The issue of obtaining personal *jurisdiction* by fraud was thoroughly briefed by *amicus curiæ*.

Waiver of a federal right is a federal question which this

court reviews *de novo*. *Ake v. Oklahoma*, 470 U.S. 68 (1986). On the basis of the record below, there is a sufficient record for this court to find that there was in fact no waiver.

B. FLORIDA'S EXERCISE OF *JURISDICTION* OVER THE PARTIES AND THE INFANT WHO WAS NEVER WITHIN THE TERRITORIAL *JURISDICTION* OF FLORIDA CONFLICTS WITH DECISIONS OF THIS COURT AND FLORIDA'S OWN CHILD CUSTODY *JURISDICTION* LAWS.

Traditional notions of fair play and fundamental fairness have dictated that a person have actual notice and an opportunity to defend. *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714. Minimum contacts has been the hallmark for the exercise of jurisdiction of non-resident litigants. *Shaffer v. Heitner*, 433 U.S. 186 (1977). Consent to a particular forum where none of the parties reside, and which by traditional tests would not be a proper forum, has been accorded only in those unique circumstances where the chosen forum has some special expertise with respect to the subject matter. *Eg., The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1971) (English forum good because of English expertise on maritime law).

None of the factors used to determine fairness, as established by decisions of this Court, were present in this case when Florida exercised *jurisdiction* over the Surrogate Mother. The Adopting Couple presented no evidence to establish that the Surrogate Mother had minimum contacts with Florida, or that she purposefully availed herself of the privilege of conducting activities within Florida, or that she could have foreseen that Florida would be exercising *jurisdiction* over her. *Shaffer v. Heitner*, 433 U.S. 186 (1977); *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945); *Hanson v. Denckla*, 357 U.S. 235 (1958); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). In fact, the only evidence, documentary and testimonial, demonstrate

quite the contrary. All the parties resided in Michigan, the contract was signed in Michigan and Infant A. was born in Michigan. The contract even recites Michigan law as controlling paternity. The Surrogate Father even admitted in the Michigan paternity suit, filed 4 months *after* the Florida paternity/adoption action was initiated that he resided in Michigan. And there certainly was no showing that Florida has some special expertise in paternity/adoption law beyond any other state court to justify its exercise of jurisdiction where there was no intent of the parities to do so. *Eg., The Bremen v. Zapata Off-Shore Co., supra*, 407 U.S. 1.

Florida statute § 61.1308(1)(a)1. and 2., which adopts the Uniform Child Custody *Jurisdiction* Act, reads, "Court of this state which is competent to decide child custody matters has *jurisdiction* to make a child custody determination by initial or modification decree if: This State: is the home state of the child at the time of commencement of the proceeding, or had been the child's home state within 6 months before commencement of the proceeding..."

At the time the paternity/adoption proceeding was commenced on August 4, 1986, Infant A. resided in the two (2) month's pregnant body of the Surrogate Mother, whose home state was Michigan.

It is clear therefore that not only does the Florida court depart from principles laid down by this court, but it even departs from its own law which is part of a Uniform Law adopted by 49 states.

C. EXERCISING PERSONAL *JURISDICTION* BASED ON CONSENT OBTAINED BY FRAUD AND COLLUSION CONFLICTS WITH WELL AND LONG SETTLED PRINCIPLES OF THIS COURT, FLORIDA LAW, AND ETHICAL CANONS ESTABLISHED FOR ATTORNEY CONDUCT.

Where *jurisdiction* is based on fraud and collusion, a party is entitled to have the resulting judgment set aside. *Michaels v. Post*, 88 U.S. (21 Wall.) 398, 426-27 (1874); *In re Lennon*, 166 U.S. 548, 552-53 (1896).

The fraud in obtaining personal *jurisdiction* was committed, if at all, upon not only the Surrogate Mother, but on the Sovereignty of Michigan, and upon the courts of Florida as well. A leading case on *jurisdictional* fraud *Staedler v. Staedler*, 78 A.2d 896, 28 ALR 2d 1291 (N.J. 1951) presented facts strikingly similar to the instant case. A husband and wife entered into an agreement, drafted by his attorney, regarding the disposition of their marital assets. The husband, who resided in New Jersey with his wife, then hired and paid for an attorney in Florida to represent her in divorce proceedings instituted in Florida. The husband mailed the wife documents which authorized the attorney selected by him to represent her in Florida, and requested that she execute them. She did so in accordance with their agreement, which required her to execute any document necessary to give full force and effect to said agreement. The wife then retained truly independent counsel (a fact not present in the instant case) in New Jersey. The New Jersey Supreme Court found that,

> "Unquestionably [the divorce] was the product of fraud upon the *jurisdiction* of Florida in which both the appellant and Respondent participated and this fraud had its inception and is grounded in the agreement..." 78 A.2d 901.

and further held that the appearance of the Florida attorney hired and paid for by the husband to represent the wife was in reality an appearance by said attorney as an agent for the husband and not an appearance on behalf of the wife. In refusing to enforce the Florida decree the court stated,

> "...we do not believe that the full faith and credit clause of the Federal Constitution was ever intended to be used

> as a shield for ... or to approve the acts performed pursuant thereto in cases where the ultimate purpose was to commit a fraud upon the *jurisdiction* of acourt of one of the several sovereign states." 78 A.2d 901.

The facts in the instant case are even more egregious than those in *Staedler, supra*, in that the Adopting Couple and their counsel committed fraud not only upon the Sovereignty of Michigan and Florida courts, but also upon the Surrogate Mother. In *DeClaire v. Yohanan*, 453 So.2d 375 (Fla. 1984) the Florida Supreme Court followed the ruling in the *seminal* case on fraud, *United States v. Throckmorton*, 98 U.S. 61 (1878) wherein the court *held*,

> "Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent as...where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat...[showing] that there has never been a real contest in the trial or hearing of the case..."

the judgment may be set aside. The fraud within the surrogacy scheme here is pervasive, beginning with the surrogacy contract, which the mother is deceived into believing is enforceable, and ending with a judgment of adoption procured by attorneys hired by the Adopting Couple to allegedly represent the Surrogate Mother's interest, but in reality are agents of the couple conniving to defeat the rights of the natural mother.

Florida provides, in adoption proceedings, that "(4) The consent shall be executed *only after the birth* of the child in the presence of two witnesses, and be acknowledged before a notary public." Fla.Stat. § 63.082. In this case, the record clearly shows that the Contract was executed before birth, and therefore the Adopting Mother had a clear and present right after the birth to recant.

The Florida Bar's Code of Professional Responsibility, DR-105 (B), (C) and (D), without question proscribes attorney Jasinski's conduct in representing the Surrogate Mother and then the Adopting Couple in the same case, unless it is obvious that he can adequately represent the interests of each party and the parties have consented to such after full disclosure of the possible effects of such. The facts in this case quite dramatically illustrate just how obvious it is that a single attorney cannot represent both the interests of a natural mother and the adopting mother in a surrogacy arrangement. No evidence was presented to establish that the Surrogate Mother consented to the sequential representation or that she was fully advised of how such could affect her case. Just last year in *The Florida Bar v. Stone*, 538 So.2d 460 (1989) the Florida supreme court held that engaging in dual representation of clients with conflicting interests warrants public reprimand. Except in exceptional circumstances, an attorney may not represent conflicting interests in the same general transaction no matter how well-meaning his motive or however slight such adverse interest may be, and that rule is rigid. *The Florida Bar v. Moore*, 194 So.2d 264 (1966). Here the parties were involved in a surrogate parenting contract,a social arrangement ripe with potential conflict from its inception.

Given the serious challenges of fraud, not contested, concerning both non-resident parties and a non-resident subject matter, the court's failure to set aside the judgment, or permit evidence clearly departs from past principals laid down by this court, although the precise issue as applied to parenting statutes has never, but should be, decided by this court in light of the arguments hereinafter.

II

WHETHER THE FLORIDA COURT HAS DEPARTED FROM FUNDAMENTAL PRINCIPLES OF 14TH AMENDMENT DUE PROCESS SET DOWN BY THIS COURT BY REFUSING EITHER TO SET ASIDE THE

JUDGMENT OR GRANT AN EVIDENTIARY HEARING WHERE THE UNCONTESTED EVIDENCE DEMONSTRATES THAT THE JUDGMENT WAS OBTAINED BY FRAUD, PRESENTS AN IMPORTANT FEDERAL QUESTION, WHICH DESERVES THIS COURT'S ATTENTION.

A. PETITIONER APPEALED THE TRIAL COURT'S FAILURE TO GRANT AN EVIDENTIARY HEARING ON THE ISSUE OF FRAUD AT ALL JUDICIAL LEVELS BELOW.

At every judicial level the Surrogate Mother raised the issue of fraud and the trial court's summary ruling on the issue without an evidentiary hearing. The Surrogate Mother exhaustively briefed case law on this issue at both the appellate court and supreme court levels. Memorandum to Verified Motion, p. 7, *citing Pelekis v. Florida Keys Boys Club*, 302 So.2d 447 (Fla. 3d DCA, 1974); Appellant's Initial Brief, p. 9; Petition for Rehearing, p. 2.

B. THE STATE OF FLORIDA'S OWN LAWS REQUIRE THE TRIAL COURT TO GRANT AN EVIDENTIARY HEARING WHERE ISSUES OF FRAUD ARE ALLEGED, AND ASSUMING ARGUENDO THAT FLORIDA LAW DOES NOT REQUIRE SUCH, FEDERAL DUE PROCESS, FAIRNESS AND SUBSTANTIAL JUSTICE DOES REQUIRE THAT PETITIONER BE GIVEN HER DAY IN COURT.

The trial court herein denied the motion for relief from judgment despite the fact that the only evidence presented, documentary and testimonial, oozed with attorney conduct ripe for fraud. The Adopting Couple didn't even bother to file an answer or present any evidence to the contrary. Yet, the trial court judge summarily denied the motion without even the slightest investigation into the issue of fraud. Florida case law holds that if the basis for a motion to vacate a final

judgment is fraud, such an allegation is so serious that a complete explanation of the circumstances of the alleged wrong is required, and therefore, merits a full opportunity to present all the available facts to the court. *Pelekis v. Florida Keys Boys Club*, (Fla.App. 1974) 302 So.2d 447 [trial court erred in denying a motion to vacate where court refused to permit depositions or handwriting samples when fraud was alleged]. In the instant case, the Surrogate Mother has sworn that she did not sign any document in front of witnesses or a notary, yet the signature on the consent to adopt has not been investigated to determine if it is in fact the Surrogate Mother's.

The mere fact that the Surrogate Mother had signed the Surrogate parenting contract does not mean that a hearing on the fraud issue was unnecessary because she was already obligated to consent to the adoption by virtue of the Surrogate parenting contract, as nothing in the pleadings, or for that matter any law at all, establishes that the Surrogate Mother was legally obligated to do so. *Whitaker v. Powers*, (Fla.App. 1982) 424 So.2d 154 [court erred in granting judgment of the pleadings in a fraud action; court rejected argument that alleged fraudulent statements only induced defendant to do what shewas already obligated to do, i.e. pay her bills]. Indeed, under Florida law, the consent was required to be signed only after birth, and by inference one signed before birth is unenforceable. Fla. Stat. § 63.082(4).

Allegations of fraud raise issues of fact, particularly in this case where the record demonstrates attorney misconduct in dually representing parties with conflicting interests. Under Florida law, fraud is not ordinarily a subject for summary judgment and, "It follows that where there are allegations of fraud, judgment on the pleadings seems even more inappropriate since no evidence is considered by the court in rendering its decision." *Farag v. Nat. Databank Sub., Inc.*, 448 So.2d 1098 (Fla. App. 2 Dist. 1984); *Levey v. Getelman*, 408 So.2d 663 (Fla.App.3d 1981). Thus the trial court in this case inappropriately rendered its decision based on only the pleadings

and in face of substantial evidence demonstrating fraudulent attorney conduct.

Because traditional notions of fair play and fundamental fairness dictate that a person have actual notice and an opportunity to defend, *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, and a party has a right to set aside a judgment procured by fraud and connivance, *Michaels v. Post*, 88 U.S. (21 Wall.) 398, 426-27 (1874); *In re Lennon*, 166 U.S. 548, 552-53 (1896), due process appears to require that the trial court either grant the motion based on the uncontested pleadings, or set the matter for an evidentiary hearing, but it requires this court to finally settle the matter.

C. THE TRIAL COURTS FAILURE TO GRANT AN EVIDENTIARY HEARING CONSTITUTED CONSTITUTIONAL AND FUNDAMENTAL ERRORS WHICH CANNOT BE WAIVED UNDER FLORIDA LAW.

In a long line of cases the Florida Supreme Court has held that Constitutional and fundamental errors can not be waived. Fundamental error has been described as an error tha. "goes to the foundation of the case or goes to the merits of the cause of action." *Clark v. State*, 363 So.2d 331, 333 (Fla. 1978). Failing to grant an evidentiary hearing on the issue of fraud, the heart of the Surrogate Mother's case, obviously strikes at the foundation and merits of the Surrogate Mother's motion for relief from judgment. Furthermore, the supreme court has said, that "for the error to be so fundamental that it may be urged on appeal, though not properly presented below, the error must amount to a denial of due process." *Ray v. State*, 403 So.2d 956, 960 (Fla. 1981). The trial court's summary judgment without an evidentiary hearing denied the Surrogate Mother an opportunity to be heard, a fundamental precept to due process. Just 15 months prior to the supreme court decision in this case, the supreme court reaffirmed the above stated cases and principles therein in *D'Oleo-Valdez v.*

State, 531 So.2d 1347 (Fla.1988).

This court has recognized that the failure in a particular case to follow precedent which has been, but for the single instance, consistently and uniformly followed, represents a denial of due process of law under the 14th Amendment. *Johnson v. Mississippi*, 108 S.Ct. 1981 (1988) (Failure to follow regularly and consistently state default law).

III

WHETHER APPLYING FLORIDA LAW IN DEROGATION OF MICHIGAN LAW IN THE ADOPTION PROCEEDING BELOW USURPS THE SOVEREIGN AUTHORITY OF MICHIGAN TO DECIDE THE PARENTAL STATUS OF MICHIGAN CITIZENS CONFLICTS WITH LONG-ESTABLISHED PRINCIPALS OF THIS COURT, AND/OR PRESENTS AN IMPORTANT FEDERAL ISSUE NOT PREVIOUSLY, BUT SHOULD NOW BE, DECIDED BY THIS COURT, AND IN VIEW OF THE GRAVE CONSEQUENCES WHICH FLOW FROM THE POTENTIAL OF UNDERMINING RESPECT FOR SISTER STATE SOVEREIGNTY, THE CASE WARRANTS REVIEW BY THIS COURT.

A. PETITIONER DID NOT WAIVE THIS ISSUE OF DUE PROCESS AS IT WAS RAISED AT THE FLORIDA SUPREME COURT LEVEL AS PERMITTED BY FLORIDA LAW.

At the Florida Supreme court level the Surrogate Mother, briefed, with statutes and case law, the due process violation that occurred when Florida applied its own law rather than the law of Michigan. As noted above, Florida law permits litigants to raise issues of due process for the first time at the supreme court level. *D'Oleo-Valdez v. State*, *supra*. Application of the wrong law is one of the most fundamental of errors a court can make, for application of Florida law in this case

permitted the judgment whereas Michigan law would have forbidden it.

B. APPLICABLE FLORIDA LAWS IN THIS CASE CONFLICT SO DRASTICALLY AND IRRECONCILABLY WITH MICHIGAN LAW THAT THE FLORIDA JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

Under Michigan law the mother must be informed of her legal rights by a judge or referee before her consent to adopt can be executed. Michigan Adoption Code § 710.44(5). Even then, the judge must be satisfied that the consent was genuine before the consent can be accepted. Michigan Adoption Code § 710.51(a). By contrast, under Florida law a consent to adopt can be executed by affidavit in the presence of a notary and two witnesses. Sec. 63.084(4), Fla. Stat. The Surrogate Mother's consent to adopt was not taken by a judge after she was told what her legal rights were. The last thing the Adopting Couple would want the Surrogate Mother to know is that she did not have to consent to the adoption even though the surrogacy arrangement contemplated such.

The Adopting Couple's selection of Florida for procuring the adoption contemplated by the surrogacy contract represents the most blatant form of forum shopping. The natural mother's consent to adopt must be quickly obtained before she has any time to discover her legal rights, as no state permits the enforceability of a pre-birth consent. E.g., Fla.Stat. § 63.082(5); Michigan Adoption Code § 710.34. Moreover, both Michigan and Florida have adopted the Uniform Child Custody Jurisdiction Act which requires that jurisdiction be had solely by a court in a state wherein the child or a parent has resided for six months or more. Fla. Stat. § 61.1308; Michigan Adoption Code § 600.651.

Even more importantly, direct placement of the infant with the adopting couple, as was done in this case, is prohibited in

Michigan, but permitted in Florida. Michigan Adoption Code § 710.41(1) and (4). Because of these conflicts of law, Florida's choice of law must be constitutionally permissible. Michigan Adoption Code and the Florida Adoption Act also conflict in other respects. *Cf*, Michigan Adoption Code § 710.513 *with* § 63.082(5), Fla. Stat.; Michigan Adoption Code § 610.64(1); *with* § 63.085(1)(b), Fla. Stat.; Michigan Adoption Code § 710.41(1), (4) *with* § 63.212(1), (b) Fla. Stat.; Michigan Adoption Code § 710.52 *with* § 63.122(1), Fla.Stat.; Michigan Adoption Code § 710.56(1) *with* § 63.182, Fla. Stat.; Michigan Adoption Code § 710.43(8) *with* § 63.062(1), (a), Fla. Stat.; Michigan Adoption Code § 710.64(1) *with* § 63.082(5), Fla. Stat. Michigan Adoption Code § 710.65(1) *with* § 63.182, Fla. Stat.; Michigan Adoption Code §§ 710.27(1), (7), 710.68(1), (8) *with* § 63.162(4), (a), (b), (c), Fla. Stat.

C. BECAUSE ALL EVENTS GIVING RISE TO THIS LITIGATION OCCURRED IN MICHIGAN AND THE SURROGATE PARENTING CONTRACT RECITES MICHIGAN LAW, THE STATE OF FLORIDA USURPED THE SOVEREIGN AUTHORITY OF MICHIGAN BY APPLYING FLORIDA LAWS AND GRANTING A JUDGMENT WHICH IS IMPERMISSIBLE UNDER MICHIGAN LAW.

Article IV, § 1, requires each state to give full faith and credit to the public Acts, Records, and proceedings in every other state. Moreover, no state may impair obligations of contract pursuant to its own rules and regulations when made in a sister state. U.S. Const., Art. 1, § 10, cl. 1; Art. IV, § 2, cl. 3.

Following a long line of cases this court stated in the leading conflicts of law case, *Allstate Insurance Company* v.

Hague, 449 U.S. 302, 308, 312 (1981),

> "In deciding constitutional choice-of-lawquestions, whether under the Due Process Clause of the 14th Amendment or the Full Faith and Credit Clause under Art. IV, § 1, this Court has traditionally examined the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation,"

and held

> "[T]hat for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."

In *Allstate*, *supra*, this court reviewed long-held U.S. Supreme Court precedents establishing this rule and described the cases of *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) and *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936) as "extreme examples" where forum states had improperly chose to apply its own laws based on one insignificant forum contact, namely that the parties bringing the suit nominally resided in the *forum* state. In those two cases, as in the instant case, all occurrences or transactions giving rise to the litigation occurred outside the forum state. The instant case is even a more extreme example of lack of contacts with the forum state in that all parties to the litigation have resided in Michigan at all times. And even assuming *arguendo* that the Adopting Couple resides at some point in Florida, such contact would be insignificant considering that every event related to the surrogacy contract occurred in Michigan.

More recently this court *held* in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), that in determining whether the choice of law is arbitrary or fundamentally unfair,

the parties intent to apply a particular state law is an important factor. In this case, the parties intent was to apply Michigan law, as the Michigan statutes regarding paternity were recited verbatim, in the "Refusal to Consent" document signed by the Surrogate Mother's husband, as controlling the paternity of Infant A.

In a case involving an indigent's due process right to counsel in a termination of parental rights proceeding, this court stated that a parent's interest in her child is an "extremely important one." *Lassiter v. Department of Social Services*, 452 U.S. 18, 31 (1981). While finding lack of counsel would not violate due process inevery case the court noted,

> "In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution." *Lassiter*, 452 U.S. 33.

This case expresses the importance and necessity for high due process standards in a termination of parental rights proceedings to ensure fundamental fairness.

Recognizing the very importance of due process in adoption proceedings, the Florida legislature enacted § 63.192, Fla.Stat. which states,

> "A judgment of court terminating the relationship of parent and child or establishing the relationship by adoption issued pursuant to due process of law by a court of any other *jurisdiction*...shall be recognized in this state..."

In *Sherrer v. Sherrer*, 334 U.S. 343, 354 (1948) this court stated, "...that under the Constitution, the regulation and control of marital and family relationships are reserved to the States" and recognized"...the importance of a State's power to

determine the incidents of basic social relationships into which its domiciliaries enter..."

Citing the Fifth Amendment due process clause, the court in *Alton v. Alton*, 207 F.2d 667, 677 (3d Cir. 1953), a leading conflicts of law case, *held*,

> "Domestic relations are a matter of concern to the state where a person is domiciled. An attempt by another *jurisdiction* to affect the relation of a foreign domiciliary is unconstitutional even though both parties are in court and neither one raises the question. The question may well be asked as to what the lack of due process is. The defendant is not complaining. Nevertheless, if the jurisdiction for divorce continues to be based on domicile, as we think it does, we believe it to be lack of due process for one state to take to itself the readjustment of domestic relations between those domiciled elsewhere..."

The court was referring to the need for states to respect the sovereignty of other states in order to ensure order in a federation of states, also the goal of the Full Faith and Credit Clause.

Because all parties in this case resided in Michigan and all occurrences giving rise to the litigation occurred in Michigan, Florida had no state interest in determining the parental status of the parties involved. Florida "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." *Phillips Petroleum Company v. Shutts*, 472 U.S., at p. 822, *citing Dick*, *supra*. By applying Florida law, the lower court did not give faith and credit to Michigan laws thereby usurping Michigan's sovereign authority to legislate regarding the termination and creation of parental rights in its citizens.

IV

THIS COURT URGENTLY NEEDS TO ADDRESS THE ISSUES RAISED IN THE PROCESSING OF SURROGATE PARENTING CONTRACTS THROUGH STATES OTHER THAN THE DOMICILE OF THE PARTIES BECAUSE FRAUD, AS DEMONSTRATED IN THIS CASE, WILL ALWAYS BE UNAFFECTED BY LEGISLATION, SUCH THAT THIS COURT MUST GIVE CLEAR GUIDANCE TO THE COURTS AS TO THEIR RESPONSIBILTY WHEN ALLEGATIONS OF FRAUD ARE RAISED IN SURROGACY CASES

Fraud is unaffected by legislation. Florida has had for some time a statute which restricts when its courts may exercise jurisdiction over children and custody questions. Fla.Stat. § 61.1308 (Uniform Child Custody Jurisdiction Act.) That has not deterred the attorneys for the Adopting couple in this case from obtaining jurisdiction in apparent fraud over the Surrogate Mother. Florida's legislation requiring residence and employment therefore does not cure the problem because fraud itself is unaffected by legislation. Moreover, all Florida has done has shifted the problem to some other hapless state and other unsuspecting surrogate mothers, and in derogation of the sovereignty of the respective states. Thus what this court must do now is set forth clear guidelines to the Courts as to their responsibilities when faced with a motion to vacate a judgement in adoption/paternity proceedings on the grounds of fraud.

While Mrs. Foster acted as a surrogate mother, she is none the less a human being, entitled, as any other litigant, to her day in court. She, as all others similarly situtated, urgently need the protection of this court if they are not be further abused by those willing to commit fraud in procurement and distribution of children.

CONCLUSION

WHEREFORE, for all, or any of,the foregoing reasons, this court should grant the writ of certiorari to the Supreme Court of Florida and summarily reverse and remand, or set the matter for briefing and argument, and such other and further relief as the court deems just and proper under the circumstances.

Dated: June 28, 1990

Respectfully submitted,

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APPENDIX

Case Number 73,696

SUPREME COURT OF FLORIDA

January 18, 1990

MICHAEL STEIN,

Petitioner,

vs.

PATRICIA CLARK FOSTER, et al.,

Respondents.

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions Third District - Case Nos.88-1448 & 88-1451 (Dade County).

Law Offices of Melvyn B. Frumkes & Associates, P.A., Miami, Florida; and Cynthia L. Greene of the Law Offices of Greene and Greene, P.A., Miami, Florida, for petitioner.

Ira M. Elegant and Carolina A. Echarte of Buchbinder & Elegant, P.A., Miami, Florida, for respondents.

Robert D. Arenstein, New York, New York; and Sharon Huddle DeAngelo, Citrus Heights, California, Amicus Curiae for the Foundation on Economic Trends.

McDonald, J.

We review *Foster v. Stein*, 534 So.2d 1218 (Fla. 3d DCA 1988), because of conflict with *Card v. State*, 497 So.2d 1169 (Fla. 1986),cert. denied, 481 U.S. 1059 (1987). Our *jurisdiction* is based in article V, section 3(b)(3), Florida Constitution. We *hold* that the district court erred in

reversing the trial court's rulings and quash *Foster*.

January 1986 Michael Stein and Patricia Foster executed a surrogate parenting agreement under which Foster agreed to bear Stein's child and then give it to Stein and his wife. A county judge serving as an acting circuit court judge entered an order determining the unborn child's paternity in December 1986.[1] Foster gave birth in March 1987 and turned the child over to the Steins. In May 1987 the same Florida judge granted the petition of Hayat Stein (Michael's wife) to adopt the child. Within a year Foster petitioned for relief from the judgment of adoption, alleging, among other things, that the administrative order assigning the county judge to the circuit court did not authorize him to enter a final judgment of adoption. The same judge who heard the earlier proceedings denied the petition. The district court reversed, voided the lower court's rulings, and held that "the county judge who executed the order and judgment was never appropriately assigned to the cause as an acting circuit judge." 534 So.2d at 1218.

As authorized by article V, section 2(b), Florida Constitution, and rule 2.050(b)(4), Florida Rules of Judicial Administration, by administrative order no. 86-149, November 10, 1986, Chief Judge Wetherington appointed seventeen county court judges to the circuit court

> "to temporarily serve as Acting and Temporary judges of the FAMILY CIVIL DEPARTMENT of the circuit Court, to hear, try, conduct, determine dispose of those cases assigned to them by the Associate Administrative

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[1] A Michigan court entered a similar order in January 1987. All documents pertaining to this adoption were executed in Michigan, and the child was born in Michigan. The petition for adoption was silent on the residence of the parties, but because of the foregoing it appears that all are Michigan residents. The issue of the *jurisdiction* of the Florida courts to consider the adoption was not raised. § 63.185, Fla. Stat. (1987), enacted subsequent to these proceedings, would clearly proscribed this in the future.

Judge of the Family vision of the Circuit Court, effective through December 1, 1986, and inclusive of December 31, 1986, and thereafter to dispose of all those matters considered by them during said period.

The named judges include Edward H. Swanko, the judge who presided over this case. On April 24, 1987 Judge Wetherington issued administrative order no. 87-59, substantively the same as order no. 86-149, covering the month of May 1987. Foster argues that, because the associate administrative judge of the family division did not assign her case to Judge Swanko specifically,[2] had no *jurisdiction* to hear it.

Even assuming that Judge Swanko had not been assigned specifically to the instant case,[3] we find the district court's voiding of his orders unwarranted. Judge Wetherington's orders validly made Judge Swanko an acting circuit court judge with the power to hear any case properly in the circuit court and within the scope of the administrative orders. Under those orders Judge Swanko "was in peaceful position, discharging his official dutiesin view of the public, with public acquiescence, and without the slightest appearance of a usurper." *State ex rel. Hawthorne v. Wiseheart*, 158 Fla. 267, 273, 28 So.2d 589, 593 (1946). It appears that Judge Swanko was, at the very least, a *de facto* circuit judge.

A *de facto* judge functions under color of authority even though that judge's actual authority suffers from some procedural defect. *Card*. Public policy and necessity, to protect the interest of the public and others dealing with a *de facto* officer, mandate adoption of the *de facto* doctrine. *Wiseheart*.

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[2] The record does not contain any such order, and Foster alleges that none exists.

[3] We do not reach the question of whether a showing that Judge Swanko had been assigned the case according to procedures dictatedby the administrative judge would supplant the necessity of a written order specifically assigning the case to him.

By ignoring the de facto doctrine and voiding Judge Swanko's orders the district court has, in essence, also voided orders entered by theother judges assigned to the circuit court.[4] The family division,to which these judges were assigned, deals with delicate andsensitive matters. Casting doubt on the finality, the very legitimacy, of the orders entered by Judge Swanko and the other judges does not protect or well serve the interests of the public.

We *hold*, therefore, that Judge Swanko was a *de facto* judge. A *de facto* judge's acts are valid. *Card*. An objection to a de facto judge's authority to serve must be timely made. At the latest this should be before the final judgment is entered in the action.[5] Because Foster did not object in a timely manner, Judge Swanko's orders should not be vacated on the grounds that he lacked capacity to act as a circuit judge.[6] Therefore, we quash the district court's decision and remand with directions to affirm Judge Swanko's rulings in this case.

It is so ordered.

EHRLICH, C.J., and OVERTON, SHAW, BARKETT, GRIMES and KOGAN, JJ.,Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTON AND, IF FILED, DETERMINED.

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[4] At oral argument Foster's counsel stated that he had looked at the circuit court's records and that hundreds of orders might be affected by the district court's ruling.

[5] This is consistent with § 38.06, Fla. Stat. (1987), dealing with the effect of disqualification of judges.

[6] The only argument presented at the trial court level was the defect in the assignment of Judge Swanko. We therefore choose to limit this opinion to the *de facto* judge issue and not to address any other points now raised by the parties.

534 So.2d 1218

Case Number Nos. 88-1448, 88-1451

APPELLATE COURT OF FLORIDA

THIRD JUDICIAL DISTRICT

October Term 1988

MICHAEL STEIN,

Petitioner,

vs.

PATRICIA CLARK FOSTER, et al.,

Respondents.

Dec. 6, 1988

Rehearing Denied Jan. 11, 1989.

Appeals from the Circuit Court for Dade County; Edward H. Swanko,Judge.

Buchbinder & Elegant and Ira Elegant, Miami, for appellants.

Frumkes and Greene and Cynthia Greene, Miami, for appellee.

Before SCHWARTZ, C.J., and BASKIN and JORGENSON, JJ.

SCHWARTZ, Chief Judge.

The issue in this case concerns the viability of a

finaljudgment of adoption and the agreed order regarding paternity upon which it was based. A careful review of the pertinent orders of the Chief Judge of the eleventh Circuit clearly reveals that the county judge who executed the order and judgment was never appropriately assigned to the cause as an acting circuit judge. Since only the circuit court, acting through a duly qualified circuit judge, has jurisdiction in paternity and adoption proceedings, Art. V, § 5(b), Fla. Const., the order and judgment were entered without jurisdiction over the subject matter[7] and are totally void. *Caudell v. Leventis*, 43 So.2d 853 (Fla. 1950); *Corak Constr. Corp. v. Scott*, 184 So.2d 460 (Fla. 3d DCA 1966), *cert.denied* 189 So.2d 633 (Fla 1966). On that ground,[8] the appellants' motion under Florida Rule of Civil Procedure 1.540(b)(4) for relief from the order and judgment as void should have been granted. *See Gelkop v. Gelkop*, 384 So.2d 195 (Fla. 3d DCA 1980); *Osceola Farms Co. v. Sanchez*, 238 So.2d 477 (Fla. 4th DCA 1970)." [9] The cause is therefore remanded with directions to vacate the order and judgment.

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[7] We need not consider the effect of the highly disturbing fact that all of the parties herein: the "surrogate" mother; the "natural" father; his wife, the adoptive mother; and the child were and are residents of Michigan who never so much as set foot in Florida. It is apparent therefore that, for unknown reasons, our courts have been employed as an unwelcome means of promoting the interests of persons who have no contact with this state.

[8] It may be added that the motion was apparently also properly based on allegations of extrinsic fraud relating to the sequential representation by the same counsel of, first, the "surrogate mother" and then the adoptive parents. See Fla.R.Civ.P. 1.540(b)(3); *DeClaire v. Yohanan*, 453 So.2d 375 (Fla.1984).

[9] This was the ruling of a trial judge in an identical prior situation. *Stern v. Whitehead*, No. 86-12060 (Fla. 11th Cir.September 4, 1986) (order granting respondent's motion for relief from judgment and respondent's supplemental motion for relief from judgment).

[10] The county judge was properly assigned to hear the Rule 1.540 motion itself.

CASE NO. 86-42848 FC (16)

IN THE CIRCUIT COURT OF DADE COUNTY, FLORIDA

CASE NO. 86-42848 FC (16)

In re: The Adoption of

[A.] [H.] STEIN

ORDER DENYING MOTION FOR

RELIEF FROM JUDGMENT

THIS CAUSE came on to be heard before me upon the VerifiedRespondent's Motion for Relief From Judgment filed herein on behalfof PATRICIA (CLARK) FOSTER and BRENT FOSTER, her husband. After hearing argument of counsel and being otherwise fully advised, it is

ADJUDGED that the said Verified Respondent's Motion for Relief From Judgment is DENIED.

ORDERED at Miami, Florida this 3 day of June, 1988.

s/Edward H. Swanko, Judge
CIRCUIT JUDGE